Public Prosecutor v Lim Kim Hoei & Anor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-09–175–08 OF 2011
MOHD HISHAMUDIN, ALIZATUL KHAIR AND LIM YEE LAN JJCA
9 DECEMBER 2013

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Criminal Procedure — Disposal property — Seized property — Seizure of properties under Dangerous Drugs (Forfeiture of Property) Act 1988 ('Act') — Claim for release of seized properties under s 32(2) of the Act — Whether claimants had to rebut presumption under s 35 of the Act that properties were 'illegal property' — Whether s 35 only applied to forfeiture proceedings under the Act — Whether inquiry under s 32(3) of the Act to determine claimant's claim not forfeiture proceedings — Whether claimants' only required to show entitlement to properties and that they were acquired through lawful means — Whether decision of Court of Appeal in Cherian a/l KC George & Anor v Public Prosecutor still good law

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The respondents were a married couple and following the first respondent's arrest under the Dangerous Drugs (Special Preventive Measures) Act 1985 on suspicion of being involved in drug trafficking activities, police seized two cars, RM600 cash and two mobile phones from the respondents' home and froze monies held by the second respondent in three savings bank accounts ('the properties') under s 25(1) of the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the Act') on the ground they were 'illegal property' under the Act. Following the first respondent's release and placement under restricted residence, the two cars were returned to the respondents under separate bonds. In accordance with s 32(2) of the Act the respondents applied for the properties to be released to them claiming they were acquired through lawful means and that the properties were not liable to forfeiture under the Act or under the Dangerous Drugs Act 1952 ('DDA'). The appellant referred the claim to the sessions court for a decision. Under s 32(3) of the Act, the sessions court was empowered to release the properties to the claimants if satisfied that no offence under the Act or under the DDA had been committed in respect of the properties and that they were not illegal properties. The sessions court in the instant case took the view the presumptions under s 35 of the Act applied to the respondents' claim and that because they had failed to rebut the presumptions, their claim failed and the properties had to be forfeited to the government. Under s 35, where any proceedings under the Act were brought against any person or in respect of any property on the ground such person was a liable person or such property was illegal property, 'the court shall presume that person to be a liable person and that property to be illegal property, unless the person proceeded against proves to the contrary by admissible evidence …'. The High Court set aside the sessions court's decision on appeal and ordered

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the properties to be released to the respondents holding that the s 35 presumptions did not apply to a s 32(2) application and that a claimant's only burden was to prove on balance of probabilities that he was lawfully entitled to the property seized. In the instant appeal it was pointed out that in *Cherian a/l KC George & Anor v Public Prosecutor* [2012] 4 MLJU 537 ('Cherian'), the Court of Appeal held that s 35 applied to 'any proceedings' under the Act including a s 32 proceeding and that the claimants there had to prove that the seized properties were not illegal properties. However, in *Hong Leong Bank Bhd v Public Prosecutor* [2009] 3 MLJ 545, a different panel of the Court of Appeal upheld a High Court's ruling that s 35 did not apply to a claim under s 32(2) of the Act.

Held, dismissing the appeal and affirming the decision of the High Court:

(1) Since the proceedings before the sessions court under s 32(3) of the Act was not forfeiture proceedings, the question of the properties claimed being presumed to be illegal under s 35 did not arise. The respondents' only burden was to adduce sufficient credible evidence that the properties were acquired by them through lawful means and that they were lawfully entitled to them (see para 38).

(2) Unlike forfeiture proceedings under Part III of the Act, the s 35 presumptions did not apply to a claim for release of seized property under s 32(2) because under s 32 no proceedings were brought against any person or in respect of any property on the ground such person was a liable person or such property was illegal property. Section 32(2) concerned a claim for property seized by police pursuant to Part IV of the Act for which: (a) no prosecution for any offence under any law was instituted with regard to such property; and (b) no forfeiture proceedings were commenced by the public prosecutor for the forfeiture of such property under Part III (see para 36).

(3) The respondents had succeeded in proving the seized properties were acquired by them through lawful means and that they were lawfully entitled to them and that no offence under the Act or under the DDA had been committed in respect of the properties. The fact the appellant did not take forfeiture proceedings under the Act but allowed the respondents' claim to be referred to the sessions court for determination showed the appellant had no reasonable grounds to believe the seized properties were illegal properties (see para 43).

(4) Although the sessions court's examination of the respondents' claim under s 32(3) of the Act was a 'proceedings' as defined under s 2(2) of the Act, it was not proceedings brought by the public prosecutor against the respondents in respect of the properties on the ground they were illegal properties as provided in s 35 (see para 37).

(5) It was not brought to the attention of the appeal panel in *Cherian*'s case that the High Court's decision in *Hong Leong Bank Bhd* had been upheld by another panel of the Court of Appeal. The appeal court in *Cherian* did not have the benefit of full-blown arguments such as were now before the present court. Had the issues and case law authorities been fully ventilated before the panel in *Cherian*, the panel would probably have come to a different conclusion (see paras 18–19).

[Bahasa Malaysia summary

Responden-responden adalah pasangan yang telah berkahwin dan berikutan tangkapan responden pertama di bawah Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 atas syak wasangka terlibat dalam kegiatan pengedaran dadah, polis telah merampas dua buah kereta, wang tunai berjumlah RM600 dan dua telefon bimbit dari rumah responden-responden dan membekukan wang yang disimpan oleh responden kedua dalam tiga akaun simpanan bank ('harta') di bawah s 25(1) Akta Dadah Berbahaya (Rampasan Harta) 1988 ('Akta tersebut') atas alasan ia adalah 'harta tidak sah' di bawah Akta tersebut. Berikutan pembebasan responden pertama dan diletakkan di bawah pemastautinan terhad, dua kereta telah dipulangkan kepada responden-responden di bawah bon-bon berasingan. Menurut s 32(2) Akta tersebut responden-responden telah memohon untuk harta tersebut dilepaskan kepada mereka dengan mendakwa ia telah diperoleh melalui sumber yang sah dan bahawa harta tersebut tidak boleh dirampas di bawah Akta tersebut atau di bawah Akta Dadah Berbahaya 1952 ('ADB'). Perayu merujuk tuntutan itu kepada mahkamah sesyen untuk keputusan. Di bawah s 32(3) Akta tersebut, mahkamah sesyen diberi kuasa untuk melepaskan harta tersebut kepada penuntut-penuntut jika berpuas hati bahawa tiada kesalahan di bawah Akta tersebut atau di bawah ADB telah dilakukan berkaitan harta tersebut dan bahawa ia bukan harta yang haram. Mahkamah sesyen dalam kes ini berpendapat andaian di bawah s 35 Akta tersebut adalah terpakai kepada tuntutan responden-responden dan oleh kerana mereka gagal mematahkan andaian tersebut, tuntutan mereka gagal dan harta tersebut hendaklah dirampas oleh kerajaan. Di bawah s 35, di mana apa-apa prosiding di bawah Akta tersebut telah dimulakan terhadap mana-mana orang atau berkaitan apa-apa harta atas alasan orang itu adalah orang yang bertanggungjawab atau harta itu adalah harta yang haram, 'the Court shall presume that person to be a liable person and that property to be illegal property, unless the person proceeded against proves to the contrary by admissible evidence …'. Mahkamah Tinggi mengetepikan keputusan mahkamah sesyen atas rayuan dan memerintahkan harta tersebut dilepaskan kepada responden-responden dengan memutuskan bahawa andaian s 35 tidak terpakai kepada permohonan s 32(2) dan bahawa satu-satunya beban penuntut adalah untuk membuktikan atas imbangan kebarangkalian bahawa dia berhak dari segi undang-undang ke atas harta yang dirampas itu. Dalam rayuan ini ia telah dikemukakan bahawa dalam kes *Cherian a/l KC George & Anor v Public Prosecutor* [2012] 4 MLJ 537

('Cherian'), di mana Mahkamah Rayuan memutuskan bahawa s 35 adalah terpakai kepada 'any proceedings' di bawah Akta tersebut termasuk prosiding s 32 dan bahawa penuntut-penuntut dalam kes itu telah membuktikan bahawa harta yang dirampas bukan harta yang haram. Walau bagaimanapun, dalam kes *Hong Leong Bank Bhd v Public Prosecutor* [2009] 3 MLJ 545, panel Mahkamah Rayuan yang berbeza telah mengekalkan keputusan Mahkamah Tinggi bahawa s 35 tidak terpakai kepada tuntutan di bawah s 32(2) Akta tersebut.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Oleh kerana prosiding di hadapan mahkamah sesyen di bawah s 32(3) Akta tersebut bukan prosiding rampasan, persoalan harta yang dituntut yang dianggap menyalahi undang-undang di bawah s 35 tidak timbul. Satu-satunya beban responden-responden adalah utuk mengemukakan keterangan bahawa harta tersebut telah diperoleh oleh mereka melalui sumber yang sah dan bahawa mereka berhak terhadapnya (lihat perenggan 38).

(2) Tidak seperti prosiding rampasan di bawah Bahagian III Akta tersebut, andaian s 35 tidak terpakai kepada tuntutan untuk pelepasan harta yang dirampas di bawah s 32(2) kerana di bawah s 32 tiada prosiding boleh dimulakan terhadap mana-mana orang atau berkaitan apa-apa harta yang merupakan harta haram. Seksyen 32(2) adalah berkenaan tuntutan untuk harta yang dirampas oleh polis menurut Bahagian IV Akta tersebut yang mana: (a) tidak ada pendakwaan untuk apa-apa kesalahan di bawah mana-mana undang-undang berhubung harta itu; dan (b) tidak ada prosiding rampasan dimulakan oleh pendakwa raya untuk rampasan harta itu di bawah Bahagian III (lihat perenggan 36).

(3) Responden-responden berjaya membuktikan harta yang dirampas itu telah diperoleh mereka melalui sumber yang sah dan bahawa mereka berhak terhadapnya dari segi undang-undang dan bahawa tiada kesalahan di bawah Aka tersebut atau di bawah ADB telah dilakukan berkaitan harta tersebut. Fakta bahawa perayu tidak memulakan prosiding rampasan di bawah Akta tersebut tetapi membenarkan tuntutan responden-responden dirujuk kepada mahkamah sesyen untuk penentuan menunjukkan perayu tidak mempunyai alasan munasabah untuk mempercayai harta yang dirampas adalah harta yang haram (lihat perenggan 43).

(4) Walaupun pemeriksaan mahkamah sesyen terhadap tuntutan responden-responden di bawah s 32(3) Akta tersebut adalah 'proceedings' sebagaimana ditafsirkan di bawah s 2(2) Akta tersebut, ia bukan prosiding yang dimulakan oleh pendakwa raya terhadap

responden-responden berkaitan harta tersebut atas alasan ia adalah harta yang haram sebagaimana diperuntukkan dalam s 35 (lihat perenggan 37).

(5) Ia tidak dikemukakan untuk perhatian panel rayuan dalam kes *Cherian* bahawa keputusan Mahkamah Tinggi dalam kes *Hong Leong Bhd* telah disahkan oleh panel Mahkamah Rayuan yang lain. Mahkamah Rayuan dalam kes *Cherian* tidak mempunyai kelebihan hujah-hujah yang terperinci seperti dalam kes ini di hadapan mahkamah ini. Jika isu-isu dan autoriti kes perundangan telah dikemukakan di hadapan panel dalam kes *Cherian*, panel tersebut kemungkinan mencapai kepada kesimpulan yang berbeza (lihat perenggan 18–19).]

Notes

For cases on seized property, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 2104–2108.

Cases referred to

Cherian a/l KC George & Anor v PP [2012] 4 MLJ 537, CA (refd)
Hong Leong Bank Bhd v PP [2009] 3 MLJ 546; [2009] 8 CLJ 463, HC (refd)
Kanagasavey a/l Sinayah v PP [1995] 2 MLJ 238, HC (refd)
Kii Sie Hoong v PP [2007] MLJU 567; [2008] 1 CLJ 683, HC (refd)
Pendakwa Raya lwn Jessie Tan Poh Yoke [2008] MLJU 910, HC (refd)
Pendakwa Raya v Tan Lee Kok [1998] 2 MLJ 65; [1998] 2 CLJ 286, CA (refd)
Public Finance Bhd v PP [1999] 4 MLJ 143; [1998] 8 CLJ 485, HC (refd)
PP v Lee Kee Seng & Anor [2005] 7 MLJ 336; [2005] 3 CLJ 649, HC (refd)
PP v Tiong Sii Chong (unreported), HC (refd)

Legislation referred to

Dangerous Drugs (Forfeiture of Property) Act 1988 ss 2(2), 3, 3(1), 4, 7(1), 8, 9, 10, 11, 12, 13, 14, 25(1), 26, 32, 32(1), (1)(a), (1)(b), (1)(c), (2), (3), (4), 35
Dangerous Drugs (Preventive Detention Measures) Act 1988 ss 3(1), 6(1)
Dangerous Drugs Act 1952
Federal Constitution art 149
Prevention of Crime Act 1959

Appeal from: Criminal Appeal No 42–66 of 2010 (High Court, Kuala Lumpur)

Awang Armadajaya bin Awang Mahmud (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Chetan Jethwani (Kumar Partnership) for the respondents.

Mohd Hishamudin JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the public prosecutor against the decision of the Kuala Lumpur High Court delivered on 25 July2011. The Kuala Lumpur High Court had set aside the order of the Kuala Lumpur Sessions Court of 21 April 2010 to the effect that the eight properties seized from the respondents under ss 25(1) and 26 of the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the Act') be forfeited to the government.

[2] The eight properties ordered to be forfeited by the sessions court under s 32(3) of the Act are as follows:

(a) a sum of RM3,471.90 in a Public Bank savings account jointly held by the second respondent and her son, Lim Cheng Yee, a minor;

(b) a sum of RM8,838.70 in a Maybank savings account jointly held by the secondrespondent and her daughter, Olivia Lim Li Har, also a minor;

(c) a sum of RM10,211.39 in the second respondent's Public Bank Al-Wadiah savings account;

(d) a sum of RM134,000 being money put up by the respondents in order to secure a bond for the temporary release to the respondents of a Mercedes Benz car bearing registration No WKW9;

(e) a sum of RM44,000 being money put up by the respondents to secure a bond for the temporary release to the respondents of a Toyota Alphard car bearing registration No WNW 99;

(f) a Nokia 8800 cell phone;

(g) a Nokia 6108 cell phone; and

(h) cash in the sum of RM600.

BACKGROUND FACTS

[3] The facts relating to this appeal have been set out in detail by the learned High Court judge in her grounds of judgment. They are as follows.

(a) The first respondent ('R1') and the second respondent ('R2') are husband and wife, respectively;

(b) On 9 July 2006, R1 was arrested by the police for the purpose of an investigation under s 3(1) of the Dangerous Drugs (Preventive Detention Measures) Act 1988 ('the PDM Act') on the ground that they had reason to believe that R1 was involved in trafficking of dangerous drugs;

(c) On the same day of R1's arrest, the police seized a Mercedes Benz car, a Toyota Alphard car, cash of RM600 and two mobile phones under s 25(1) of the Act from the respondents' home in Taman Desa, Kuala Lumpur, on the ground that the police had reason to believe that these properties constituted illegal properties under the Act;

(d) R1 was subsequently detained at the rehabilitation centre in Johore under s 6(1) of the PDM Act; and upon his release he was placed under restricted residence in Sentul pursuant to the Prevention of Crime Act 1959;

(e) The Mercedes Benz car was subsequently released to the respondents under a bond in the sum of RM134,000, and the Toyota Alphard car was released under a bond in the sum of RM44,000;

(f) The respondents subsequently applied under s 32(2) of the Act for the eight properties to be released to them on the ground that they are lawfully entitled to those properties.

(g) In accordance with the requirements of s 32(2), the public prosecutor referred the respondents' claim to the Kuala Lumpur Sessions Court for decision.

(h) In pursuing their claim before the sessions court, the respondents themselves gave evidence and called four other witnesses. The respondents tendered various documents in support of their claim. The public prosecutor called the investigation officer from the Narcotics Investigation Department of Bukit Aman as his sole witness.

DECISION OF THE SESSIONS COURT

[4] At the conclusion of the inquiry under s 32(3) of the Act, the sessions court judge came to the conclusion that the respondents had failed to rebut the presumptions under s 35 of the Act, to entitle the release of the eight properties to them. Accordingly, he ordered the eight properties to be forfeited to the government.

[5] In the course of his judgment, the learned sessions court judge relied on the decisions in *Kanagasavey a/l Sinayah v Public Prosecutor* [1995] 2 MLJ 238; *Public Finance Bhd v Public Prosecutor* [1999] 4 MLJ 143; [1998] 8 CLJ 485, *Kii Sie Hoong v Public Prosecutor* [2007] MLJU 567; [2008] 1 CLJ 683;

Pendakwa Raya v Jessie Tan Poh Yoke [2008] MLJU 910; and *Public Prosecutor v Lee Kee Seng & Anor* [2005] 7 MLJ 336; [2005] 3 CLJ 649. These cases held that in an inquiry held by a court under s 32 of the Act, the presumptions under s 35 of the Act that a person shall be deemed to be a liable person, and the property claimed shall be deemed to be illegal property, shall apply.

[6] Dissatisfied with the decision of the sessions court, the respondents appealed to the High Court.

DECISION OF THE HIGH COURT

[7] On 25 July 2011, upon hearing the appeal, the learned High Court judge allowed the respondents' appeal, set aside the order of the sessions court and ordered that the eight properties be returned to the respondents. In arriving at her decision the learned High Court judge applied the decision in *Hong Leong Bank Bhd v Public Prosecutor* [2009] 8CLJ 463 in which it was held that in an application under s 32(2) the presumptions in s 35 do not apply and the only burden of a claimant is to prove on a balance of probabilities that he is lawfully entitled to the property.

[8] Dissatisfied with the decision of the High Court, the public prosecutor appealed to this court against the said order.

OUR DECISION

[9] We heard the appeal on 5 September 2012,and we adjourned the matter to 28 November 2012 for decision and brief grounds of judgment.

[10] We now deliver our full grounds of judgment.

ISSUES FOR DETERMINATION

[11] At the hearing before us both learned DPP, Mr Awang Armadajaya bin Awang Mahmud, and learned counsel for the respondents, Mr Cheten Jethwani, agreed that the main issues for determination by this court are, firstly, whether in a claim made under s 32(2) of the Act for the return of any property seized by the police under Part IV of the Act, the presumptions in s 35 that the property shall be deemed to be illegal property shall apply; secondly, if the answer to the first issue is in the affirmative, whether the respondents had discharged their burden of proving, on a balance of probabilities, that the eight properties seized from them by the police were not illegal properties but were acquired through lawful means; thirdly, if, on the other hand, the answer to the first issue is in the negative, whether the respondents are entitled to the

properties.

FIRST ISSUE

[12] In regard to the first issue, in our judgment we agree with the learned High Court judge that the presumptions in s 35 do not apply to a proceedings under s 32 of the Act. We say so for the following reasons.

[13] We shall begin by setting out the provisions of ss 32 and 35 which read as follows:

> Forfeiture of property seized under this Act where there is no prosecution, or no proceedings under Part III or no claim thereto.
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> 32 (1) Where any property has been seized under this Act, other than under or by virtue of Part VII, and:
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> (a) no prosecution for any offence under any law is instituted with regard to such property;
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> (b) no proceedings are commenced by the Public Prosecutor for the forfeiture of such property under Part III; and
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> (c) no claim in writing is made by any person that he is lawfully entitled to such property and that it is not liable to forfeiture under this Act or under the Dangerous Drugs Act 1952, within three months from the date of its seizure, the property shall become forfeited immediately upon the expiration of the said period of three months.
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> (2) Where within three months from the date of the seizure of any property under this Act, a claim in writing is made thereto by any person in the terms mentioned in paragraph (c) of subsection (1), the Public Prosecutor shall within fourteen days after the expiry of the said period of three months, refer such claim to a Sessions Court for its decision.
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> (3) The Sessions Court to which a claim is referred under subsection (2) shall issue a summons requiring the person claiming that he is lawfully entitled to the property, and the person from whom it was seized, if he and his whereabouts are known, to appear before the Court and upon such appearance or in default of such appearance, upon due service of such summons being proved, the Sessions Court shall proceed to the examination of the matter and if satisfied that no offence under this Act or under the Dangerous Drugs Act 1952 has been committed in respect of the property claimed and that such property is not illegal property, shall order the same to be released to the person claiming the same upon proof that he is lawfully entitled thereto, and shall, in any other case, order the property to be forfeited.
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> *Presumption as to liable person and illegal property*
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> 35 Where any proceedings under this Act are brought against any person or in respect of any property on the ground that such person is a liable person or that such property is illegal property, the Court shall presume that person to be a liable person

A and that property to be illegal property, unless the person proceeded against proves to the contrary by admissible evidence and where he adduces any such evidence, the Public Prosecutor shall have the right to rebut the same.

B **[14]** The interplay between ss 32 and 35 had received judicial interpretation in a number of cases: see *Pendakwa Raya v Tan Lee Kok* [1998] 2 MLJ 65; [1998] 2 CLJ 286, *Public Finance v Public Prosecutor, Kii Sie Hoong v Public Prosecutor, Pendakwa Raya v Jessie Tan Poh Yoke, Public Prosecutor v Lee Kee Seng & Anor* and *Hong Leong Bank Bhd v Public Prosecutor* [2009] 3 MLJ 546; [2009] 8 CLJ 463; culminating in the latest decision of the Court of Appeal in C *Cherian a/l KC George & Anor v Public Prosecutor* [2012] 4 MLJU 537.

[15] It is noted that, with the exception of *Hong Leong Bank Bhd*, all the decided cases above had taken the position that in an application under s 32(2) of the Act the presumptions under s 35 apply. In *Hong Leong Bank Bhd*, the D Kuala Lumpur High Court took the view that s 35 has no application to s 32(2) and the only burden of a claimant under that section is to prove that he is lawfully entitled to the property seized under s 25(1).

E **[16]** The case of *Hong Leong Bank Bhd* went on appeal by the public prosecutor to the Court of Appeal. The appeal was heard by a panel comprising Azhar Ma'ah, Syed Ahmad Helmy Syed Ahmad and Balia Yusof Wahi JJCA, vide Criminal Appeal No W-09–7 of 2009. On 24 March 2011 the Court of Appeal upheld the decision of the High Court. Unfortunately, no grounds of F decision were delivered by the panel.

[17] However, the decision of the Court of Appeal in *Cherian* (the panel comprising Raus Sharif, PCA, Mohd Hishamudin and Anantham Kasinather JJCA) preferred the view as held in *Public Finance*, *Kii Sie Hoong*, G *Jessie Tan Poh Yoke* and *Lee Kee Seng* in interpreting s 32. In *Cherian* the Court of Appeal held:

> 21 With respect, we are more inclined to agree with the majority of the High Court Judges which have held that the presumption under s 35 of the Act is applicable to a proceeding under s 32 of the Act. We share the view that s 35 was intended to apply H to all proceedings under the Act. The wordings in s 35 are very clear. It uses the words 'any proceeding[s]'. The words 'any proceedings' should and must be given the ordinary meaning that it covers all proceedings under the Act. To say that a proceeding under s 32(3) of the Act is not a proceeding that is envisaged under s 35 of the Act and would not be in tendem with the intention of law makers and would I be in violation to the clear wordings of s 35 of the Act.
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> 22 Thus in the instance case, the Appellants are claiming for the return of the properties seized by the Police pursuant to s 25(1) of the Act. s 35 of the Act places upon the Appellants to prove by admissible evidence that the properties are not illegal properties. It places no burden on the Public Prosecutor to prove anything.

The burden has shifted to the Appellants. And on the facts of this case, the Appellants had failed to prove that the properties are not illegal properties. It was their contention that the properties were acquired through internet football betting and friendly loan activities. But both the Sessions Court and the High Court found such claims were not supported by evidence. We have perused through the records and we have found that there is no credible evidence to back the Appellants' claim. Thus, we have no reason to differ from the findings of the Courts below. The presumption thus remains unrebutted and the properties are presumed to be illegal and therefore it has been rightly forfeited to the Government of Malaysia.

23 The provisions under s 35 may be harsh or unjust. In this respect, we only need to quote the wise words of Raja Azian Shah FCJ (as his Royal Highness then was) speaking on the 'harsh and unjust law' in the case of *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187:

The question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution, for as was said by Lord Macnaghten in *Vacher & Sons Ltd v London Society of Compositors* [1913] AC 107 at p 118:

Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature.

It is the province of the courts to expound the law and 'the law must be taken to be as laid down by the courts, however much their decisions may be criticised by writers of such great distinction' per Roskill LJ in *Henry v Geopresco International Ltd* [1975] 2 All ER 702 at p 718. Those who find fault with the wisdom or expediency of the impugned Act, and with vexatious interference of fundamental rights, normally must address themselves to the legislature and not the courts; they have their remedy at the ballot box.

[18] With respect, we have a different view. We believed the court in *Cherian* did not have the benefit of full blown arguments, such as are now before us. It was also not brought to the attention of the panel in *Cherian* that the decision of the High Court in *Hong Leong Bank Bhd* was upheld by the Court of Appeal. The Court of Appeal in *Cherian* was also not informed by counsel appearing before it that *Hong Leong Bank Bhd* was followed by the High Court of Kuching in the unreported judgment of the Sibu High Court in case No Sibu 42 of 2010 *Public Prosecutor v Tiong Sii Chong*.

[19] In our opinion, had the issues and the case law authorities been fully ventilated before the panel in *Cherian*, the panel then would probably have come to a different conclusion.

[20] In our judgment, ss 32 and 35 should not be read in isolation, but have to be read in the light of and in context of the legislative intent behind the enactment of the Act.

Objectives of the Act

[21] This Act, as stated in the preamble to the Act, was made pursuant to art 149 of the Federal Constitution and its a vowed objectives are 'to make provisions for offences in relation to property, and for the seizure and forfeiture of property, connected with activity related to offences under this Act, the Dangerous Drugs Act 1952, or any foreign law corresponding to these Acts or to the provisions for offences under these Acts; for assistance to foreign countries in relation to matters connected with dangerous drugs; and for matters connected with the aforesaid provisions'.

[22] The Act gives effect to such objectives by providing for offences in relation to property under Part II; for forfeiture of illegal property of a liable person (as defined in s 2(2)) by way of proceedings under Part III; for the special powers of investigation, arrest and seizure of movable and immovable property suspected to be illegal property in Part IV; and for assistance to a foreign country under Part V.

[23] To this end and to better achieve the objectives of the Act, Parliament has deemed it fit to give very wide and expansive definitions to certain terms used in the Act, in particular, the terms 'liable person', 'illegal property' and 'prohibited activity'.

[24] Section 2(2) of the Act defines 'liable person' as 'a person referred to in s 7 as being liable to be proceeded against under Part III'; and s 7(1) provides that the following persons shall be liable to be proceeded against under this Part, namely:

> (a) every person
>
> (i) who has been finally convicted of an offence under section 3, 4, or 24(7), or under a foreign law corresponding to these sections, or of a Scheduled offence, committed at any time after the commencement of this Act;
>
> (ii) who is or was detained after the commencement of this Act pursuant

to an order of detention or restriction made under any law, in respect of any activity relating to or involving the trafficking in any dangerous drug:

Provided that the activity forming the ground of detention took place after the commencement of this Act;

(iii) who holds, conceals, receives, or uses or causes or allows to be used, any illegal property, knowing or having reason to believe the same to be illegal property;

(b) every relative of a person referred to in para (a);

(c) every associate of a person referred to in para (a);

(d) any holder, whether or not a relative as is referred to in para (b), or an associate as is referred to in para (c), (hereinafter in this para referred to as the 'present holder') of any property which was at any time previously held by a person referred to in para (a) unless the present holder or, as the case may be, any one who held such property after the person referred to in para (a) and before the present holder, is or was a purchaser of the property in good faith for valuable consideration;

(e) where a person referred to in paras (a), (b), (c) or (d) is deceased, his personal representative, or, where there is no personal representative, such person or persons having a beneficial interest in the estate of the deceased as may be specified by a sessions court upon application by the public prosecutor and after the sessions court has given an opportunity to such person or persons to be heard in the matter.

[25] The term 'illegal property', in turn, is defined as:

any property, whether within or outside Malaysia:

(a) which is wholly or partly derived or obtained from or by means of any prohibited activity carried out by any person after the commencement of this Act;

(b) which is the income, earnings or assets wholly or partly derived or obtained from or by means of any property referred to in paragraph (a);

(c) which is wholly or partly derived or obtained from or by means of any property referred to in paragraph (a) or (b);

(d) which is wholly or partly traceable or attributable to any property referred to in paragraph (a), (b), or (c), or to any income, earnings or assets of any such property;

(e) which, after the commencement of this Act, is or was used to assist or facilitate any prohibited activity;

(f) which is the subject matter of an offence under section 3, 4, or 24(7) or of any Scheduled offence committed after the commencement of this Act; or

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(g) which, due to any circumstances such as, but not limited to, its nature, value, location or place of discovery, or the time, manner or place of its acquisition, or the person from whom it was acquired, or its proximity to other property referred to in the foregoing paragraphs, can be reasonably believed to be property falling within the scope of any of the foregoing paragraphs.

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[26] While a 'prohibited activity' is defined as:

any act, activity, or conduct taking place in whole or in part within or outside Malaysia which (a) constitutes an offence under section 3 or 4 of this Act, or under any foreign law corresponding thereto or which constitutes a Scheduled offence; or (b) although not constituting such an offence, is of such a nature or occurs in such circumstances that it could be reasonably believed there from that it would have ultimately resulted in or led to the commission of such an offence.

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D

Forfeiture proceedings under the Act

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[27] As stated earlier, one of the objectives of this Act is to provide for the forfeiture of any property reasonably suspected to have been acquired through the proceeds of drug trafficking activities of a convicted drug trafficker or person suspected to be a drug trafficker and any person closely associated with him as defined under the term 'liable person' and 'holder'.

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[28] Proceedings for the forfeiture of any illegal property of a liable person or a holder are provided for in the procedures laid out in Part III of the Act which covers ss 7 to 14.

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[29] Based on the scheme of the Act under Part III, it is clear that under the Act the only person liable to be proceeded against under the Act is a liable person and the only properties liable to forfeiture are the properties of a liable person or holder of properties which the public prosecutor has any reason to believe are *illegal properties*.

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BURDEN ON A LIABLE PERSON TO SHOW CAUSE

[30] It is to be noted that in a forfeiture proceedings under Part III, the entire burden is on a liable person or a holder to show cause that the properties sought to be forfeited from him are not illegal properties. It is easy to understand the rationale behind this provision. As drug trafficking activities are normally conducted in a secret and covert manner, in practice it would be difficult if not impossible for the public prosecutor to determine whether a property acquired by a drug trafficker or any person associated with him is or is not the proceeds

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of his or their drug trafficking activities. Hence, the law reverses the burden of proof by requiring a drug trafficker or a holder of his property to show cause to the contrary that the property to be forfeited is not acquired through drug trafficking activities, or the proceeds of drug trafficking activities as naturally such matters would be within his or their personal knowledge.

[31] In addition, to provide the necessary bite to the powers of the public prosecutor in a forfeiture proceeding under Part III, the Act provides in s 35 for certain presumptions to enable the court to presume, until the person proceeded against proves to the contrary, that he is a liable person or the property proceeded against is illegal property.

FORFEITURE UNDER S 32

[32] It is to be noted that s 32 comes under Part IV of the Act. Section 32(1) provides for a situation where any property seized under this Act by the Police can be forfeited. Such a situation is where, after the seizure of such property:

(a) no prosecution for any offence under any law is instituted with regard to such property;

(b) no proceedings are commenced by the public prosecutor for the forfeiture of such property under Part III; and

(c) no claim in writing is made by any person within three months from the date of seizure that he is lawfully entitled to such property and that it is not liable to forfeiture under this Act or under the Dangerous Drugs Act 1952 ('the DDA'),

[33] In which case the property shall become forfeited immediately upon the expiration of the said period of three months.

[34] Section 32(2) goes on to provide that where within three months from the seizure of any movable property under the Act a claim in writing is made thereto by any person in the terms mentioned in para (c) of sub-s (1), the public prosecutor shall within fourteen days after the expiry of the said period of three months, refer such claim to a sessions court for its decision.

[35] Section 32(3) then provides that the sessions court to which a claim is referred under sub-s (2) to issue a summons requiring the person claiming that he is lawfully entitled to the property, and the person from whom it was seized, if he and his whereabouts are known, to appear before the court and upon such appearance or in default of such appearance, upon due service of such summons being proved, the sessions court shall proceed to the examination of the matter and if satisfied that no offence under this Act or under the DDA has

A been committed in respect of the property claimed and that such property is not illegal property, shall order the same to be released to the person claiming the same upon proof that he is lawfully entitled thereto;but shall, in any other case, order the property to be forfeited.

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[36] While it is not disputed that any property seized under this Act may be forfeited if they fall within the circumstances stated in s 32(1), however, it is our view that, unlike a forfeiture proceedings under Part III, the presumptions under s 35 of the Act do not apply to a claim made under s 32(2) for the release C of such property. This is because under s 32 no proceedings is brought against any person or in respect of any property on the ground that such a person is a liable person or that such property is illegal property. Instead, s 32(2) relates to a claim made by a person in respect of any property seized by the police pursuant to Part IV of the Act for which, (a) no prosecution for any offence D under any law is instituted with regard to such property; and (b) no forfeiture proceedings are commenced by the public prosecutor for the forfeiture of such property under Part III.

[37] Now reverting to the appeal before us, while the examination by the E sessions court of the respondents' claim for the return of the eight seized properties under s 32(3) is a proceedings under this Act as defined in s 2(2), it is, however, not a proceedings brought by the public prosecutor against the respondents in respect of the eight seized properties on the ground that such F properties are illegal properties as provided in s 35. Instead, under s 32(3) the sessions court examines the claim and if satisfied that the conditions under s 32(3) for the return of the properties are met, shall return the properties to the respondents.

G **[38]** Bearing in mind that since s 32(3) are not forfeiture proceedings under the Act, the question of the property claimed being presumed to be an illegal property under s 35, unless it is proved to the contrary by the respondents, does not arise at all. The only burden of the respondents is to adduce sufficient credible evidence that the properties were acquired by them through lawful H means and that they were lawfully entitled to such properties.

[39] As to how the sessions court arrives at its satisfaction with regard to the other conditions laid down in s 32(3) for the return of the eight seized properties, namely, (a) that no offence under this Act or under the Dangerous I Drugs Act 1952 has been committed in respect of the property claimed; and (b) that such property is not illegal property, such facts must come from the investigation officer in charge of the case as the two matters would be within his full knowledge and he must assist the sessions court judge in the determination of the same.

[40] In this regard, it must be borne in mind that persons who may apply for the return of properties seized by the police under this Act may fall under various categories: they include financial institutions such as finance companies or commercial banks or licensed moneylenders that had provided financing facilities for the purchase of such properties. Surely it could not be within the contemplation of the Act that the court shall presume that the properties claimed by them are illegal properties unless they can adduce evidence to the contrary, for example, that the money utilised by the hirer or borrower to buy such properties are not the proceeds of illicit drug trafficking activities?

[41] In conclusion, we answer the first question in the negative.

SECOND ISSUE

[42] Having answered the first issue in the negative, there is no necessity for us to deal with the second issue.

THIRD ISSUE

[43] Suffice for us to state here that having carefully perused the appeal record, we are inclined to agree with the findings of the learned High Court judge that the respondents had succeeded in proving that the seized properties were acquired by them, through lawful means and that they were therefore lawfully entitled to the said properties. In particular, we quote the conclusion reach by her in her judgment to which we agree:

> This court was of the view that based on the undisputed facts as set out above, the appellants had adduced sufficient admissible evidence to prove on a balance of probabilities that they were lawfully entitled to the seized properties because between them they had sufficient funds derived from their income from their respective employments, commissions earned, and with regard to the first appellant from his winnings from his gambling activities and also from the monies paid by MISG to the second appellant to purchase and did purchase the Mercedes Benz car, the Toyota Alphard motor vehicle and the two mobile phones. They also had sufficient funds derived from their income from the same sources to give and did give the monies in the second appellant's two joint bank savings accounts to their two minor children in the form of cash gifts placed inside red packets on Chinese New Year and to own and possess the RM600 which was recovered from the first appellant.

[44] In regard to the three items, namely cash of RM600 and the two hand phones seized, we wish to make one disturbing observation. The police departmental investigation officer, in his testimony, had conceded that there is an internal police departmental circular to the effect that properties of a value

below RM1,000 should not be seized in view of the practical difficulties on the part of a claimant in proving the sources of funds used to acquire such properties. Hence, the seizure of the RM600 and the two hand phones was against the Police department's own internal directive. We also find it incredulous that the police did not even bother to exercise their power under s 32(4) of the Act to release these items of miniscule value to the respondents, especially when these items were seized in contravention of a police departmental directive. Instead, they adopted the lackadaisical attitude of referring all the seized items for the determination of the sessions court judge who not only had to waste precious judicial time to hear evidence on how these items were acquired but also pain stakingly agonised over whether or not they should be returned or not to the respondents! What is even more surprising is that, in regard to the three items, the sessions court judge actually made a finding that the respondents had failed to rebut the presumptions in s 35 of the Act that the RM600 and the two Nokia hand phones were illegal properties.

[45] We further note from the records that it was established through the cross-examination of the investigation officer that no proceedings for the forfeiture of the eight seized properties were taken by the public prosecutor under Part III of the Act. Neither was there any evidence that a prosecution for an offence under the Act had been instituted against the respondents or with regard to the eight seized properties.

[46] The fact that the public prosecutor did not take forfeiture proceedings under s 8 of the Act but, instead, allowed the police to refer the respondents' claim to the sessions court for determination showed that the public prosecutor had no reasonable grounds to believe that the eight seized properties were illegal properties.

[47] We, therefore, agree with the submission of learned counsel for the respondents and the findings of the High Court judge, that in this case, it has been established by the respondents through their own evidence and that of their witnesses, as well as through the cross-examination of the investigation officer, that, on a balance of probabilities (a) the seized properties were acquired through lawful means by the respondents; and (b) that no offence under this Act or under the DDA has been committed in respect of any of the seized properties.

CONCLUSION

[48] In view of our foregoing findings, we agree with the findings of the learned High Court judge that the learned sessions court judge erred in law and in fact when he ordered the eight seized properties to be forfeited to the government.

[49] Consequently, we find no merits in this appeal. In the premises, we dismiss this appeal and affirm the decision and order of the High Court judge that the eight seized properties to be returned to the respondents.

Appeal dismissed and decision of the High Court affirmed.

Reported by Ashok Kumar